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Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: Department of Commerce--Determining Compliance with Statutory Limitation on Architectural and Engineering Design Services

File: B-258058

Date: May 8, 1995

## DIGEST

For purposes of determining compliance with the 6-percent limitation on architectural and engineering (A&E) design fees contained in section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 254(b), the National Oceanic and Atmospheric Administration should include all administrative costs incurred in support of the A&E contractor's delivery of design services.

## DECISION

Section 304(b) of the Federal Property and Administrative Services Act of 1949 (FPASA), as amended, limits the fee payable by the government for architectural and engineering (A&E) services (often referred to as a design fee) to 6 percent of the estimated cost of construction of a public works or utility project. 41 U.S.C. § 254(b). In 1986, the National Oceanic and Atmospheric Administration (NOAA) awarded a contract to Fluor Daniel, Inc., for design services and construction support for a network of modernized offices. An Office of Inspector General (IG), Department of Commerce, audit report dated March 25, 1993, concluded that Fluor Daniel had received reimbursement for costs that were in excess of the statutorily allowed maximum fee. The IG found that Fluor Daniel incurred certain administrative costs in support of design services that should have been included in determining compliance with the statutory limit.

The IG requested our views on whether indirect costs should be included in the contract costs for purposes of applying the 6-percent fee cap. We think they should. Because the administrative services at issue here appear to have benefitted Fluor Daniel's delivery of design services to NOAA, we agree that NOAA should include these costs in determining compliance with the 6-percent limitation.

## BACKGROUND

As part of its efforts to modernize the National Weather Service, NOAA undertook a major construction program consolidating 240 weather offices into 116. In 1986, NOAA

entered into a cost-plus-fixed-fee level of effort contract with Fluor Daniel for a base year and four option years. Under the contract, Fluor Daniel provided design services and program and project management support. Fluor Daniel, for example, conducted the procurement for the construction of the weather offices, and after NOAA entered into the construction contracts, Fluor Daniel provided construction management and inspection services. To support its work under the NOAA contract, Fluor Daniel established an office in Kansas City, Missouri to provide administrative support (e.g., office management, accounting, personnel administration) to its contract operations.

Notwithstanding the advice of the Department's Office of General Counsel, NOAA did not include in the contract with Fluor Daniel the 6-percent design fee limitation. This would have contractually limited the price to NOAA for the A&E services acquired under the contract to 6 percent of the total estimated cost of the weather office construction program. Instead, Fluor Daniel charged NOAA all costs it incurred in connection with the contract without regard to the 6-percent design fee limitation.

On March 21, 1995, the IG's report on his closeout audit of the Fluor Daniel contract, for the period from August 4, 1986 through October 31, 1992, questioned $4,581,798 in costs charged to NOAA as in excess of the statutory limit. Because NOAA had not included the fee limitation in the contract, it had not estimated project construction costs, so there was no total estimated construction cost on which to base a calculation of the 6-percent design fee. The IG, therefore, based his calculation of the fee on his own estimate of total construction cost, $43,719,055.[1] Using that amount, the design fee limit would have been $2,623,143. The IG calculated that Fluor Daniel had charged NOAA a total design fee of $7,204,941, exceeding the limit by $4,581,798. In calculating the amount Fluor Daniel had charged NOAA for design services, the IG included the direct costs of design services plus a portion of the administrative costs incurred by Fluor Daniel's Kansas City Office. (The IG excluded from his calculation of Fluor Daniel's fee costs of the Kansas City Office allocable to other contract tasks, e.g., program and project management support, construction management and inspection services.) The IG recommended that the contracting officer recover the overpayment from Fluor Daniel. The contracting officer has not yet issued a final decision on this matter.

The IG concluded that because the Kansas City Office provided administrative support for design services, a portion of its costs are covered by the 6-percent fee, and amounts incurred in excess of the 6-percent limitation are not payable. In a December 1993 report to the contracting officer, the National Weather Service Manager of the Modernization Program argued that the 6-percent limitation is not applicable here, because these costs do not directly or indirectly contribute to the preparation of plans and specifications. In support of his position, he points to a pre-award audit by the Defense Contract Audit

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[1]Audit Report No. DEN-6927-5-0001, App. II, p.1 of 12 note b (Mar. 1995).

Agency (DCAA) of a follow-on contract that NOAA entered into with Fluor Daniel in 1993. In this audit report, DCAA addressed a concern that had been raised by a Department official regarding the need to develop a formula for allocating labor costs that might be considered costs common to all tasks under the contract. DCAA concluded that the labor costs were related to specific contract tasks, not common in nature, and would constitute direct charges under the contract. DCAA Audit Report No. 3201-93F21000023-51, May 28, 1993. Although DCAA did not address the specific issue that the IG has since raised regarding the treatment of the costs of Fluor Daniel's Kansas City Office, the IG, in light of the program manager's report to the contracting officer, asked DCAA to reconsider its conclusion. DCAA, in response, repeated its earlier conclusion, and pointed out that the new contract with Fluor Daniel, in including the 6-percent limitation, specifically defined those costs covered by the limitation. This contract included the design fee limitation, but established a design fee computation formula that excluded the Kansas City Office costs. DCAA said that "any allocation of these direct costs as indirect costs on the books and records of Fluor Daniel would result in noncompliances with Cost Accounting Standards, the contractor's Disclosure Statement, Federal Acquisition Regulations, and the terms of [the contract]." DCAA Audit Report No. 3201-94F43510001, June 24, 1994. Because the contract specifically excluded the Kansas City costs from the fee limitation, DCAA declined to express an opinion on whether the contract could allocate the Kansas City administrative costs to design services. The report characterized this as a legal issue, requiring a legal determination.

DISCUSSION

Section 304(b) of the FPASA states that "a fee inclusive of the contractor's costs and not in excess of 6 percentum of the estimated costs, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility projects . . .". 41 U.S.C. § 254(b). The issue presented by the IG is a narrow one: namely, whether under section 304(b) the design fee covers indirect costs allocable to the delivery of design services, such as the Kansas City Office administrative costs that Fluor Daniel billed as direct costs.

We addressed this issue in a 1966 decision, 46 Comp. Gen. 573 (1966). The Commissioner, Public Buildings Service, General Services Administration, had argued, similarly to the National Weather Service's program office, that the section 304(b) limitation does not apply to costs not directly related to design. The Commissioner would have excluded such indirect, administrative costs as travel, per diem, and the reproduction of designs. The Commissioner pointed out that the Congress had based section 304(b) on 1939 legislation that referred solely to costs of "production and delivery of the designs, plans, drawings, and specifications". The Commissioner argued that for that reason, we should construe section 304(b) as limited to the costs of professional services incurred in the preparation of designs and plans. Since section 304(b) requires that the fee be "inclusive of the contractor's costs", we held that the fee covers all costs, including any

indirect costs. We explained our holding as follows:

> "This section [section 304(b)] establishes a maximum fee 'in contracts for architectural or engineering services' without limitation or reference to the 'production and delivery of the designs, plans, drawings and specifications.' Apart from the broad language of that section, the omission of the specific language contained in the 1939 act is itself a significant indication that no exclusions from application of the fee limitation were intended by the Congress. Moreover, an analysis . . . prepared by the . . . War Department which, together with the Department of the Navy, drafted the legislation states that 'the limitation of the fee to the contractor is inclusive of all costs incurred by him in the performance of the contract.' . . . See page 33 of H. Rept. No. 109, 80th Cong., 1st sess.
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> In our opinion, section 304(b) of the Federal Property and Administrative Services Act is not limited solely to the costs of professional services incurred in that segment of the contract requiring the preparation of designs, plans, etc. Rather, it imposes a limitation on the total compensation payable for all services performed under the architect-engineer contract, regardless of whether the cost of these services represents travel expenses, consultant fees, reproduction expenses, . . ." 46 Comp Gen. at 574. See also 46 Comp. Gen. 556, 564-65 (1966).

Therefore, to the extent that the Kansas City Office provided administrative and other services in support of the delivery of design services, those administrative costs should be included in determining compliance with the fee limitation.

The IG has concluded that the Kansas City Office administrative expenses at issue did relate to Fluor Daniel's production and delivery of design services. In a January 11, 1994 memorandum to the NOAA contracting officer, the IG explained that Kansas City accounting personnel, for example, prepared invoices to NOAA for design services, performed payroll accounting services for designers, and processed payables for design subcontractors. The Assistant General Counsel for Finance and Litigation, Department of Commerce, agreed. Memorandum for Director, Central Administrative Service Center, Department of Commerce, page 13 (Feb. 23, 1994). The National Weather Service

program office did not dispute the IG's explanation. Given the record before us, we have no reason to question the IG's description of the functions performed by Kansas City personnel. Consequently, we agree with the IG that the administrative costs at issue are associated with the delivery of design services, and, as such, covered by the 6-percent limitation.

/s/ James F. Hinchman

for Comptroller General
of the United States